No. 02-859

Supreme Court, U.S.
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In The
Supreme Court of the United States

R. SCOTLUND VAILE,

Petitioner,

versus

CISILIE A. PORTSBØLL f/n/a CISILIE A. VAILE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Nevada

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Nevada Supreme Court had *jurisdiction*, and Nevada was the *proper venue*, to make the determination to return the minor children under the International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction for children wrongfully removed from Norway by the Petitioner.

2. Whether the Nevada Supreme Court properly found that it need not review the underlying parenting agreement by the parties for sufficiency under Norway law, since it was foreclosed from doing so by the International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction.

3. Whether the Petitioner was afforded procedural and substantive due process rights.

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INTRODUCTORY STATEMENT

The Nevada Supreme Court properly applied state law and an international treaty in the evaluation of jurisdiction and venue to determine that two minor children should be returned to Norway, from which they had been wrongfully removed (by way of parental kidnaping) by the Petitioner and taken to the United States. Norway is their place of habitual residence, and their home jurisdiction for all custody disputes, and Respondent was properly exercising her custodial rights by way of court order and written agreement between the parties at the time of the wrongful removal.

Petitioner had been participating in custody proceedings in Norway at the time he sought an order in the Nevada district court by means of perpetrating a fraud upon the court.

Petitioner fails to state complete facts and freely mixes the concepts of *subject matter jurisdiction* with the proper selection of *venue* for the proceedings which took place below. There is no novel legal issue and Petitioner was afforded procedural and substantive due process. The Petition should be denied.

OPINIONS BELOW

The opinion of the Nevada Supreme Court is reported at *Vaile v. Vaile*, 118 Nev. ___, 44 P.3d 506 (Adv. Opn. No. 27, April 11, 2002), and it appears to be correctly reprinted as Petitioner's Appendix A. The *Writ of Mandamus* from the Nevada Supreme Court appears to be correctly reprinted as Petitioner's Appendix B. The *Order* from the Nevada district court appears to be correctly reprinted as Petitioner's Appendix C. The *Order Denying Rehearing* from the Nevada Supreme Court appears to be correctly reprinted as Petitioner's Appendix D.

STATEMENT OF JURISDICTION

Without waiving any claims as to the merit of the assertions made by Petitioner, Respondent concurs with

petitioner's *Statement of Jurisdiction*. However, both parties submitted cross-motions for rehearing to the Nevada Supreme Court and both were denied on September 5, 2002, giving rise to the ninety-day timing.

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

In addition to the portions set forth in the Petition, relevant provisions of the *Hague Convention on the Civil Aspects of International Child Abduction* state:

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a. to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b. to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures –

f. to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g. where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h. to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child; . . .

CHAPTER III – RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

ICARA

In addition to the portions set forth in the Petition, relevant provisions of the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610, state:

42 U.S.C. § 11604:

> (a) AUTHORITY OF COURTS. – In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 4(b) of this Act may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the further removal or concealment before the final disposition of the petition.

Appendix C – Legal Analysis of the Hague Convention on Civil Aspects of International Child Abduction

The Petition did not include any of official legal analysis of the Convention and ICARA, set out in the Federal Register, Vol. 51, No 58, March 26, 1986, the relevant portions of which state:

Guide to Terminology Used in the Legal Analysis

. . . "Wrongful retention" is not intended by the Convention to cover refusal by the custodial parent to permit visitation by the other parent.

. . . "Country of origin" and "requesting country" refer to the child's country ("State") of habitual residence prior to the wrongful removal or retention. "Country addressed" refers to the country ("State") where the child is located or the country to which the child is believed to have been taken. It is in that country that a judicial or administrative proceeding for return would be brought.

I. Children Protected by the Convention

D. Effect of Custody Order Concerning the Child

1. Existing Custody Orders

Children who otherwise fall within the scope of the Convention are not automatically removed from its protections by virtue of a judicial decision awarding custody to the alleged wrongdoer. . . .

Thus, under Article 17 the person who wrongfully removes or retains the child in a Contracting State cannot insulate the child from the Convention's return provisions merely by obtaining a custody order in the country of new residence, or by seeking there to enforce another country's order. . . .

II. Conduct Actionable Under the Convention

B. *Wrongful Removal or Retention*

1. Holders of Rights Protected by the Convention

(b) *"Jointly or alone."*

Article 3(a) and (b) recognize that custody rights may be held either jointly or alone. Two persons, typically mother and father, can exercise joint custody, either by court order following a custody adjudication, or by operation of law prior to the entry of a decree. The Convention does not distinguish between these two situations, as the commentary of the Convention reporter indicates:

> Now, from the Convention's standpoint, the removal of a child by one of the joint holders

> without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.

Perez-Vera Report, paragraph 71 at 447-448.

2. "Wrongful Removal or Retention" Defined

(c) Sources of "custody rights".

iii. *Custody rights arising by reason of agreement having legal effect.*

Parties who enter into a private agreement concerning a child's custody have recourse under the Convention if those custody rights are breached. Article 3. The only limitation is that the agreement have legal effect under the law of the child's habitual residence.

Comments of the United States with respect to language contained in an earlier draft of the Convention (*i.e.* that the agreement "have the force of law") shed some light on the meaning of the expression "an agreement having legal effect". In the US view, the provision should be interpreted expansively to cover more than only those agreements that have been incorporated in or referred to in a custodial judgment. *Actes et documents de la Quantorzieme Session, (1980) Volume III. Child Abduction*, Comments of Governments at 240. The report's observations affirm a broad interpretation of this provision:

> As regards the definition of an agreement which has 'legal effect' in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities.

Perez-Vera Report, paragraph 70 at 447.

III. Judicial Proceedings for Return of Child

C. *Pleading Requirements*

The Convention does not expressly set forth pleading requirements that must be satisfied by an applicant who commences a judicial return proceeding. In contrast, Article 8 sets forth the basic requirements for an application placed before a Central Authority . . . for the return of the child. Since the objective is identical – the child's return – whether relief is sought through the courts or through intercession of the Central Authority, it follows that a court should be provided with at least as much information as a Central Authority is to be provided in a return application filed in compliance with Article 8.

F. *Judicial Notice*

In ascertaining whether there has been a wrongful removal or retention of a child within the meaning of Article 3, Article 14 empowers the court of the requested State to take notice directly of the law and decisions in the State of the child's habitual residence. Standard procedures for the proof of foreign law and for recognition of foreign law would not need to be followed and compliance with such procedures is not to be required.

H. *Constraints upon Courts in Requested States in Making Substantive Custody Decisions*

Article 16 bars a court in the country to which the child has been taken or in which the child has been retained from considering the merits of custody claims once it has received notice of the removal or retention of the child. The constraints continue either until it is determined that the child is not to be returned under the Convention, or it

becomes evident that an application under the Convention will not be forthcoming within a reasonable time following receipt of the notice.

J. *Return of the Child*

Assuming the court has determined that the removal or retention of the child was wrongful within the meaning of the Convention and that no exceptions to the return obligation have been satisfactorily established by the respondent, Article 12 provides that "the authority concerned shall order the return of the child forthwith." . . .

IV. Central Authority ("CA")

A. *Establishment of Central Authority*

. . .

Rather than mandating the establishment of a CA in every state, it is expected that state governments in the United States will be requested on a case-to-case basis to render specified assistance, consistent with the Convention, aimed at resolving international custody and visitation disputes with regard to children located within their jurisdiction.

B. *Duties*

. . .

Articles 7(f) and (g). In the United States the federal CA will not act as a legal advocate for the applicant. Rather, in concert with state authorities and interested family law attorneys, the CA through state or local bodies, will assist the applicant in identifying competent private legal counsel or, if eligible, in securing representation by a Legal Aid or Legal Service lawyer. . . .

STATEMENT OF THE CASE

Respondent Cisilie A. Portsbøll f/k/a Cisilie A. Vaile ("Cisilie") refers this Court to the underlying published opinion *Vaile v. Vaile*, 118 Nev. ___, 44 P.3d 506 (Adv. Opn. No. 27, April 11, 2002), as her primary statement of facts. *See* Petitioner's Appendix A. There are a few factual

inaccuracies in the Nevada Supreme Court's opinion, which are addressed below.[1] More disturbing are the factual inaccuracies in Scotlund's Petition, the more egregious of which are identified below.

Page 8 of Scotlund's Petition claims "the British court temporarily enjoined the parties from removing the children from the United Kingdom." The assertion is true, but incomplete. The British restraining order of June 6, 1998, prohibited Scotlund from removing the children, applying for replacement passports, and encouraging others to remove the children, and ordered him to return the passports to Cisilie's solicitor. I Appendix to Appellant's Emergency Petition for Writ of Mandamus and Writ of Prohibition, Exhibit 1A.[2] The subsequent British court order of July 8, 1998, returned Scotlund's passport to him, and gave Cisilie her own and the children's passports, ***and*** custody of the children[3] and permission to leave the United Kingdom with them. I Writ App. Ex. 1B.

Scotlund claims that when he presented Cisilie with a proposed property and custody agreement in "the spring of 1998," he "was already registered to vote in Nevada, had his driver's license there, and had stored belongings there while traveling abroad." Petition at 8. This is not true. Scotlund admitted on the stand that he applied for his Nevada driver's license on July 14, 1998 – ***after*** he left England, and only days before he filed his *Complaint for Divorce* – the same day that he registered to vote in

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[1] No disrespect is intended. The Nevada Supreme Court heard this matter on an emergency writ, bypassing the usual process of a regular record on appeal. The few factual inaccuracies do not affect the outcome, but help explain the course of proceedings, and their correction supports the result reached.

[2] That four-volume appendix contained the bulk of documents referenced by the Nevada Supreme Court and in this Opposition. It will be referenced here in the form "[vol.] Writ App. Ex. [#]."

[3] In British parlance, a "Residence Order." I Writ App. Ex. 1B.

Nevada during his brief visit to Las Vegas.[4] Tr. 10/11/2000 at 20; A9. He "stored" nothing in Nevada before the divorce; his mother (who lived in Maine) took some of his personal property with her when ***she*** moved from Maine to Las Vegas. Tr. 10/11/2000 at 21-23.

Scotlund claims to have declared Nevada as his residence on his "previous federal income tax return." Petition at 8. This also is not true. Scotlund admitted that his 1997 tax return (filed in 1998) listed ***Virginia*** as his residence, and he swore that he had not filed a tax return for 1998 and 1999 as of the date of the hearings in 2000. Tr. 10/11/2000 at 31. There was ***no*** Nevada residence ever listed on any tax return.

Despite Scotlund's claim on page nine that he and Cisilie "broadly agreed to joint custody and to the jurisdiction of the Nevada Court," parties cannot convey subject matter jurisdiction to a court by agreement (as discussed in detail by the Nevada Supreme Court Opinion at A17). The facts revealed that neither of the parties, and neither of the children, were ***ever*** residents of Nevada, and that Nevada never had subject matter jurisdiction over custody issues relating to the children. A4, A9. As the Nevada Supreme Court noted, Scotlund only visited Las Vegas for a few days in 1998 before he departed and returned to England, and his claim of Nevada residency to pursue a divorce was a lie. *Id.* The divorce decree he obtained was fraudulent, and the Nevada Supreme Court's only question on appeal was whether his fraud made it entirely void, or only "voidable." A7-A15.

Scotlund also omits recital of his several overt post-divorce lies to the Nevada district court by which he secured the Order for custody at the March 29, 2000, hearing before his kidnap of the children. Scotlund's

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[4] It is common practice in Nevada to register to vote while securing a driver's license, as the Department of Motor Vehicles affords applicants the means to register to vote at the agency's counter. That is how and why Scotlund registered.

Motion for that Order falsely asserted that the children were Nevada residents and that Cisilie had refused to "move the children ***back*** to Nevada." Motion filed February 18, 2000, at 8 & 10-11.

At the hearing of March 29, 2000, Scotlund falsely told the Nevada district court that Cisilie had been properly served with the Motion.[5] When the Nevada district court judge attempted to confirm that the court had jurisdiction to enter a custody order, Scotlund and his counsel lied to the court at length, giving assurances that the children had lived in Las Vegas, Nevada, "all their lives" and had "lived in Las Vegas prior to leaving for Norway," and that Cisilie had failed to "return" them from a "visit" to Norway. Tr. 3/29/2000 at 2-3. This series of specific lies to the Nevada district court resulted in the fraudulent Order for a change in custody obtained by Scotlund in advance of his kidnap of the children from Norway.[6]

Despite the British court order granting Cisilie custody, and the Norway proceedings in which Scotlund was participating, he claims at page nine of his submission to this Court to have "violated no existing court order" when he kidnaped the children from Norway.[7] Scotlund

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[5] Actually, he had served her in Norway only seven days prior to the hearing – in violation of Nevada Court Rules. *See* Eighth Judicial Court Rule 2.20(a): "All motions must contain a notice of motion setting the same for hearing on a day when the judge to whom the case is assigned is hearing civil motions and ***not less than 21 days from the date the motion is served and filed***. . . . " (Emphasis added.)

[6] Scotlund's fraudulent Motion of February 18, 2000, is part of the court record; the transcript of the district court hearing of March 29, 2000, was supplied to the Nevada Supreme Court in the Supplemental Exhibits for Writ of Mandamus and Writ of Prohibition filed February 7, 2001.

[7] Scotlund did not follow any sort of domestication procedure of his fraudulently-procured Order; it was not a "pick up order," nor was it valid in Norway. Nor was Cisilie given the opportunity of seeking a stay or appeal as she was not served the Order until ***after*** the children were kidnaped. A6.

makes almost no mention of the Norway custody proceedings in which he had been participating fully before seeking his fraudulent order in Nevada.[8] *See* A5. Scotlund was well aware that he was acting improperly and illegally when he kidnaped the children.[9]

Scotlund asserts that he "filed a custody suit in Texas, where he and the children actually lived." Petition at 10. This, too, is inaccurate, in several ways that bear on his Petition for review by this Court. Scotlund's Texas filings were based on attempted domestication there of his fraudulent ***Nevada*** documents. Scotlund had initiated proceedings in Nevada by his fraudulent Nevada divorce complaint in 1998 and his fraud-laced custody motion in 2000, long before he first sought to invoke the jurisdiction of the Texas courts in August, 2000.[10] The Nevada Order he attempted to register in Texas was the fraudulent custody and contempt order ultimately ruled void by the Nevada Supreme Court. *Id.*

Cisilie, through Texas counsel, made a special appearance in the Texas court on September 15, 2000, in which she informed the Texas court that it lacked jurisdiction over her, and that the Nevada Order had been obtained by way of fraud. I Writ App. Ex. 1V.

The ***Texas*** court suspended all further proceedings in that state until the courts of Nevada could determine

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[8] He had Norwegian counsel, speaks fluent Norwegian, and appeared and submitted to personal jurisdiction of the Oslo court, all starting around November, 1999. A2, A5. Yet Scotlund never advised the Nevada district court that concurrent proceedings for evaluation of the underlying parenting agreement he foisted on Cisilie in England were underway. Instead, Scotlund lied about the children residing in Nevada for their entire lives.

[9] The sensational aspects of the wrongful taking are compelling, making the Norway news television programs, and a chase/manhunt involving the Oslo Police Department, Interpol, the governments of Norway and this country, the Las Vegas Metropolitan Police Department, and the Texas Denton County Sheriff's Department.

[10] *See* I Writ App. Ex. 1U.

whether or not Scotlund's decree, and subsequent custody and contempt orders, were proper. That determination was eventually made when the Nevada Supreme Court's Opinion held void all custody aspects of both the decree and the later orders Scotlund obtained to enforce it.

It is important to note that Scotlund and the children did not ***live*** in Texas – at least not when the proceedings under the Hague Convention were initiated. Scotlund (along with an as-yet undetermined number of accomplices) kidnaped the children from Norway on May 17, 2000. I Writ App. Ex. 1 at 18; A5-A6. Cisilie immediately filed a police report, and by May 19, 2000, had filed an "Application for Return – Kidnaping of Children" with the Norwegian Ministry of Justice and Police. I Writ App. Ex. 1 at 20 & Ex. 1Q.

Pursuant to the Convention, Norway's Central Authority transmitted the application for return of the children to the Office of Children's Issues, United States Department of State, on May 29, 2000. I Writ App. Ex. 1R. It specifically noted that neither Cisilie nor the Norwegian government knew ***where*** Scotlund was located, although Cisilie supplied possible addresses where Scotlund might have been headed, including four addresses in the United States (one of which was in Las Vegas) and in three other countries.[11]

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[11] Specifically, the May 29, 2000, application by the Central Authority of Norway to the United States Central Authority states: "The child [sic] is now assumed to be living with their father Robert Scotlund ... in the USA. The applicant does not know the exact whereabouts of Mr. Scotlund [sic], and she has therefore listed several possible addresses (enclosed)." It goes on to state that Cisilie thought that Scotlund was at that moment in Ohio with his father. The list Cisilie provided to the ministry notes that Scotlund had claimed his "legal" address as 7640 Little Valley Avenue, Las Vegas, Nevada 89117, which she explained was his mother's address; she further noted that the mother (Jane Fiori) claimed to have moved and included Jane's new address in Henderson, Nevada (a suburb of Las Vegas).

Article 6 of the Convention authorizes "Federal States" to designate one or more than one Central Authority, but unlike some other such countries (notably Canada), the United States elected to have a ***single*** Central Authority, which is located in the Office of Citizen's Consular Services of the United States State Department. 22 C.F.R. § 94.2. It contracts with a quasi-governmental nonprofit corporation, the National Center for Missing and Exploited Children, to determine in which court a Hague proceeding should be brought, and to secure counsel to do so.

A petition for return can be brought either directly to a court in the "Contracting State" (i.e., the United States), or by application to the Central Authority, which then assists in securing counsel for the purpose of filing a petition in the "appropriate court in the Contracting State where the child is located" (i.e., the "proper" American court). 22 C.F.R. § 94.3; Appendix C – Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,507 (March 26, 1986).

In ***this*** case, Norway chose to make application to the United States Central Authority, as noted above, on May 29, 2000; the application is believed to have been physically received in the United States a few days later, in early June, 2000.

The American Central Authority, operating through the National Center for Missing and Exploited Children, contacted undersigned counsel for the purpose of filing appropriate proceedings for return in a Nevada court, because the Central Authority was on notice that there was already an ongoing legal action in Nevada (the motions initiated by Scotlund) and because Scotlund claimed Nevada as his residence in the papers he filed.[12]

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[12] The significance of this fact to Scotlund's assertion that the Nevada courts lacked "jurisdiction" to order return of the children under the Hague Convention is explored below.

Scotlund later testified that after he took the children in Norway he brought them to Las Vegas, where he and they were physically present in June, 2000, although he hedged as to the exact dates, and suggested that the time might have extended into early July. Tr. 10/11/2000 at 5-6.

The remaining proceedings were pretty much as summarized by the Nevada Supreme Court in its Opinion. *See* A6-A7. Scotlund incorrectly asserts that the Nevada district court "refused to hear issues related to Cisilie's Hague Convention petition." Petition at 10. The district court ***did*** entertain a full evidentiary hearing, allowing both sides to call and cross-examine witnesses, introduce exhibits, etc.; the district court just refused to return the children in accordance with the Hague Convention, based on its erroneous reading of the law (subsequently corrected by the Nevada Supreme Court). A6, A21-A28.

In a similarly misleading paragraph, Scotlund asserts that the Norwegian trial court dismissed the case pending there, making the claim that the court there "upheld the validity of the [British] agreement, in addition to noting the Nevada court order." Petition at 11.

Known to Scotlund's attorneys, but absent from his exposition, is the fact that on February 9, 2001, the Bogarting Court of Appeal in Norway ***overturned*** the Norwegian trial court. The Appellate Court found that the Vaile children were residents of, and substantially settled in, Norway; that Cisilie was exercising rights of custody as to the children when they were kidnaped and properly brought the custody suit in Norway; that Scotlund's removal of the children was wrongful; and that Norway should hear the custody matter. *See* Motion for Permission to Submit Supplemental Exhibits, Post Oral Argument, Relating to Petitions for Writ of Mandamus and Writ of Prohibition, filed February 15, 2001; Order Granting Motion, filed February 16, 2001.

Scotlund claims that Cisilie relied on the Nevada divorce decree in taking custody of the children and moving to Norway. Petition at 12. This is false. Cisilie moved to Norway from ***England*** in June, 1998, before

Scotlund ever came to or filed for divorce in Nevada. A3-A4; A12.

REASONS FOR DENIAL OF SCOTLUND'S WRIT PETITION

1. The Nevada Supreme Court Had *Jurisdiction*, And Nevada Was The *Proper Venue*, To Make The Determination To Return The Minor Children Under The International Child Abduction Remedies Act And The Hague Convention On The Civil Aspects Of International Child Abduction For Children Wrongfully Removed From Norway By The Petitioner.

Scotlund has – with apparent deliberation – confused the concepts of jurisdiction and venue; the core of his Petition is his assertion that the Nevada Supreme Court was not permitted to order return of the children to Norway. Petition at 15-17. He is incorrect.

a. The Nevada Courts Had Jurisdiction To Make The Hague Convention Determination

Specifically, Scotlund claims that 42 U.S.C. § 11603(b), and the cases he lists, demand that a Hague Petition be filed in a specific state of the United States, and that only the limited area immediately around the children's physical location from moment to moment can exercise jurisdiction to hear a Hague Petition. He further submits that Nevada lacked jurisdiction to enter a Hague decision because the children were not residents of Nevada. Petition at 16. Scotlund's assertions are incorrect legally, factually, and logically.

42 U.S.C. § 11603(a) sets forth "jurisdiction" as used in the Hague Convention: "The Courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention." The clear intent was to avoid any petty jurisdictional questions between courts in order to more expeditiously

handle any Hague petitions. All U.S. courts have jurisdiction to hear petitions under the Convention, and Scotlund's basic premise, that the Convention prohibits filing a petition for return of children "anywhere in the United States," is incorrect. *See* Petition at 16. The Convention, and ICARA, resolve the question of ***which*** court should hear a case as a matter of venue, as discussed below.

The Convention uses the terms "member countries" and "contracting States" interchangeably; the term "State" in Hague terms usually means the United States collectively, not the component States of this country. 22 C.F.R. § 94.1(b). Hague petitions differ from, and should not be treated in the same way as, ***custody*** cases. Unlike custody determinations, a child's residence, or lack thereof, has nothing to do with a court's ability to rule on a Hague petition. There is no mention of subject matter or personal jurisdiction in ICARA; the Convention is only concerned with returning children to the ***country*** that can make a custody determination.

The Convention directs the countries adopting it to "promote co-operation amongst the competent authorities in their respective States" to avoid jurisdictional squabbling. This is accomplished in the United States by way of the direction in ICARA granting authority to "any court" to make temporary orders as necessary to serve the purposes set out in the Convention. The formal commentary from the Department of State when the Convention was presented for ratification was that:

> any court may take or cause to be taken provisional measures under State or Federal law, as appropriate, to protect the child from neglect or abuse or to prevent its removal from the jurisdiction or its concealment, while the petition filed pursuant to the Convention and this Act is pending.[13]

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[13] Written Testimony of Peter H. Pfund, Assistant Legal Adviser for Private International Law, Department of State, before the House

(Continued on following page)

Actions under the Convention must be made in a "court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed." 42 U.S.C. § 11603(b). Scotlund erroneously asserts that the children were in Texas, and that a Hague Convention decision to return the children could only be made there. Petition at 16-17. He is wrong, for several reasons.

First, as established by Scotlund's own sworn testimony at the hearing of October 11, 2000, the children were not ***in*** Texas, but en route to and then staying in ***Nevada***, at the time that the Norway Central Authority made its formal application to the United States Central Authority for return of the children on May 29, 2000. I Writ App. Ex. 1R; Tr. 10/11/2000 at 5-6. The question silently posed by Scotlund's Petition is whether he can defeat application of the treaty by having crossed a state line by the time that the lawyers could file papers and a hearing could be convened. The answer to this question is "no."

As the Nevada Supreme Court noted, Scotlund's filings in the Nevada district court were fraudulent. However, those filings set in motion a sequence of events that created jurisdiction in Nevada to make the Hague determination. The cross-allegations of kidnaping led Judge Steel to issue an order whereby the children were to be picked up and maintained in protective custody at Child Haven[14] pending a hearing as to what was actually going on. *See* Order filed September 29, 2000.

Before that order could be enforced, Scotlund was informed of the order (and that the Denton County police had literally broken down his door in an effort to retrieve the children) and he ***returned the children to Nevada***

Judiciary Committee, Subcommittee on Administrative Law and Governmental Relations, February 3, 1988, at 6.

[14] The Las Vegas institution for the protective custody of children involved in court proceedings.

himself, where they were placed into Child Haven on September 30. In other words, not only when the Norwegian application was filed, but again by September 30, 2000, the ***only*** "place where the child is located" was Nevada. That remained true through the date where the Hague request for return was made to and rejected by the district court (which error the Nevada Supreme Court reversed).

At the time the children were brought to Nevada, the district court had not yet heard the evidence proving that Scotlund was never a resident, and that his 1998 divorce complaint was fraudulent. The Nevada district court was acting with ostensible authority at that time.

It was Scotlund's own actions, and filings, that gave the Nevada district court emergency jurisdiction to issue orders for the protection of the children under 42 U.S.C. § 11604, until and unless it could be determined that the court of some other state should issue such orders. Until the Nevada Supreme Court ruled that the Nevada orders Scotlund had obtained were void, both parties were obligated to proceed in Nevada, and both the Texas and Norway courts properly deferred to the Nevada proceedings.

Therefore, Scotlund's complaint that the Nevada Supreme Court does not have "nationwide jurisdiction" is irrelevant. *See* Petition at 17. Neither the Convention nor ICARA, nor its regulations, provide a definition of "place" or any specific guidance for determining ***which*** court in the United States is "proper," except to state that the duty to have a prompt hearing and determination regarding return supersedes any possible conflict under the UCCJA[15] or PKPA,[16] or with a custody order rendered in favor of an abductor before a court had notice of the wrongful removal

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[15] The Uniform Child Custody Jurisdiction Act, implemented in Nevada as Nev. Rev. Stat. ch. 125A.

[16] The Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A.

or retention. Federal Register, Vol. 51, No. 58, March 26, 1986, *supra*, at 10,504-10,505. The courts of this country are directed by the Convention and ICARA to cooperate in holding the requisite hearing expeditiously.[17] Convention, Article 2.

The presence or absence of "home state" jurisdiction under statutes relating to custody is irrelevant for Hague Convention purposes, since the order in question is explicitly ***not*** a custody order, but only a means for restoration of a "factual status quo ante" so that the courts of the ***country*** of habitual residence can ***make*** a custody order.[18] Federal Register, *supra*, at 10,505. The children in this case did not have a "home state" in the United States when they were kidnaped from Norway.[19]

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[17] At this juncture, it is appropriate to note that as an International Treaty, the Hague Convention is the supreme law of the land. *See, e.g., Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

[18] The UCCJA encourages states to defer to one another in appropriate circumstances, and provides mechanisms by which one state can ask another to resolve a legal or factual dispute. *See* Nev. Rev. Stat. 125A.220, 125A.230. In this case, the Texas courts decided – correctly – that Nevada was best equipped to decide whether or not the underlying Nevada orders had been procured by Scotlund fraudulently. The physical presence of the children in Nevada, and the Texas court's deferral of decision-making under Nev. Rev. Stat. 125A.050(d) (Nevada courts to exercise jurisdiction when "another state has declined to exercise jurisdiction") was the only "emergency jurisdiction" or "vacuum jurisdiction" required for Nevada to act pursuant to the direction of the American Central Authority to make a Hague determination.

[19] Since the children had been in Texas only because they were kidnaped and brought there, Texas was not their "home state" any more than was Nevada, and their presence there did not create a habitual residence. *See Isaac v. Rice*, http://hiltonhouse.com/cases/Isaac_fed_dist.txt (Civ. Action No. 1:97CV353, N.D. Miss. 1998) (child was not "habitual resident" of Israel, despite his presence there for 11 years, when he had been brought to that country by kidnap without the knowledge or consent of the left-behind parent); *see also Diorinou v. Mezitis*, 237 F.3d 133 (2d Cir. N.Y. 2001); *Lops v. Lops*, 140 F.3d 927 (11th Cir. 1998) (there, as here, the children were placed in protective custody of the local department of family services, and thus were "located" in that

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Scotlund's statement to this Court that the children were never "located" in Nevada is belied by his own testimony at the evidentiary hearing, where he swore that he brought them to Las Vegas for some weeks after the kidnaping. Tr. 10/11/2000 at 5; *cf.* Petition at 17. This alone is sufficient reason why Scotlund's attack on the "jurisdiction" of the Nevada Supreme Court must fail. Since the children were "located" in Nevada at all relevant times, the Nevada district court qualified under the expansive definitional provision of:

> any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place [i.e., country] where the child is located at the time the petition is filed.

42 U.S.C. § 11603(b).[20]

In other words, it is true that Scotlund's assertion of residency was fraudulent, and the Nevada courts lacked subject matter jurisdiction or personal jurisdiction sufficient to grant a divorce in 1998. Scotlund's custody and contempt order in 2000, based on that divorce decree, was therefore also void. However, the Nevada district court ***did*** have jurisdiction to make a Hague determination in October, 2000, because the children were physically located in Nevada when Norway filed its application for return of the children, and when the hearing was held, and because the only other court that could have possibly acted elected to defer to the Nevada court as permitted by Article 2 of the Convention and 42 U.S.C. § 11603(a).

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jurisdiction for purposes of ICARA; the opinion notes that in some circumstances, children at issue in a Hague case can be seized in one state, and be transferred to and "located" in a different state at the time of the Hague determination).

[20] It is correct that the dissenting justices of the Nevada Supreme Court would have found no jurisdiction to make the Hague determination, but they were under the mistaken belief that Scotlund was not in Nevada at the time that Norway made application for the children's return. *See* A31, A39.

b. Nevada Was The Proper Venue To Make The Hague Convention Determination

The text of the Convention itself, and ICARA, demonstrates that the Nevada courts had ***jurisdiction*** to entertain the Hague proceedings; Scotlund's attack on the order returning the children to Norway is more properly seen as an attack on the propriety of the venue.[21]

Scotlund lists various cases, without explaining how any of them allegedly support his position. They do not do so. There is dicta within the opinions explaining various courts' decisions as to which court has "jurisdiction" to consider the Hague petitions in question, but they go to the question of ***venue*** – i.e., which court is the most appropriate court to hear the issue.

Hazbun Escaf v. Rodriquez, 191 F. Supp. 2d 685 (E.D. Va. 2002) holds that the federal district court had concurrent jurisdiction with the state court and was not required to decline to hear petition due to the existence of a pending state court matter. *Diorinou v. Mezitis*, 237 F.3d 133 (2nd Cir. 2001) and *Ohlander v. Larson*, 114 F.3d 1531 (10th Cir. 1997) hold that full faith and credit must be given to other contracting state's prior Hague determinations when considering a Hague Petition. In *Miller v. Miller*, 240 F.3d 392 (4th Cir. 2001), venue was transferred to North Carolina from New York, where the children were located

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[21] Two primary purposes of venue rules are to provide defendants with protection from having to defend suits in unfair or inconvenient forums for trial, and to protect defendants from having to defend suits in courts remote from their residences or from where the acts underlying the controversies occurred. 1 JAMES WM. MOORE ET AL., *Moore's Manual: Federal Practice and Procedure*, § 7.02[3] (2002). "Venue is concerned with the relationship of the defendants and the events to the particular judicial district in which a case is brought." *Id.* As with personal jurisdiction, lack of venue may be waived if no timely objection is made. *Id.*; *see also* FED. R. CIV. P. 12(h)(1). In this case, Scotlund never made any request to transfer the venue of the Hague inquiry to Texas.

at the time of the petition, because North Carolina was considered a more convenient forum.[22]

Lops v. Lops, 140 F.3d 927 (11th Cir. 1998) is the leading "jurisdictional" case between states; however, its determination went to whether the Georgia federal court overstepped its authority in hearing a Petition when proceedings were already pending in a North Carolina state court. The Circuit Court determined, correctly, that the court that could hear the Petition ***most expeditiously*** is the one that should exercise jurisdiction.

The court in *Holder v. Holder*, 305 F.3d 854 (9th Cir. 2002), cited *Lops* and indicates that the physical presence of the children is necessary to convey jurisdiction to a specific court, and opined that Mr. Holder would "probably" have been prevented from seeking a Hague hearing in California due to a lack of jurisdiction. The opinion, however, did not reverse a Hague decision due to its being heard in one venue over another.

In fact, although the various opinions cited above use the labels "jurisdiction" and "venue," ***no opinion*** holds that a Hague determination made in one U.S. state should be overturned due to its more properly being heard in another U.S. state. Scotlund has used the buzzwords "split of authority" and "intent of Congress." Petition at 17. He has ***not*** demonstrated, however, that any such split exists (we do not see one), or that the expressed intent of Congress – that "Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention" – was anything other than satisfied by the

[22] The *Miller* Court's comment that Mr. Miller had "no valid order from any court allowing him to remove the children from Canada to the United States without Ms. Miller's consent" is equally applicable here. Scotlund had no valid order from any court allowing him to remove the children from Norway to the United States; his fraudulently-obtained custody order from Nevada is of no use to him, and he did not even attempt to go through valid Norwegian domestication proceedings, instead simply kidnaping the children and spiriting them away.

Nevada Supreme Court Opinion returning the kidnaped children to Norway. *See* 42 U.S.C. § 11601(a)(2).

Once ***any*** state or federal court of the United States could hold a hearing at which the treaty obligations of the United States under the Convention could be raised and decided, the superseding duty of the American court was to make the Hague determination. Nevada made it, and the Texas courts granted that order full faith and credit, and enforced it by putting the children on a plane for Norway. That is exactly what the Convention, and ICARA, intended to accomplish.

Nevada could have made the Hague Convention determination even if the children had ***not*** been brought here after their kidnaping from Norway. At that time, it was unclear where Scotlund had absconded to with the children; his filings claimed Nevada, but rumor placed Scotlund and the children in Ohio, Virginia, New York, Utah, and Texas.

Nothing in the Convention or ICARA suggests that a kidnaper can defeat the treaty by keeping his precise location unknown or in flux; Article 1 of the Convention would not permit any such reading. The Convention is not concerned with "jurisdiction" per se; it is designed so that ***whatever*** court has the children before it can take steps "expeditiously" to return them to the country in which their custody should be determined.

Additionally, the ready power of courts to defer to one another under the Convention and ICARA is designed for just such cases as this one. Essentially, Scotlund's argument is that because he perpetrated a fraud on the Nevada courts, he deprived them of any ability to apply the Convention so as to return the children to Norway. Texas deferred to Nevada precisely because there was an ongoing case in Nevada, because ***Scotlund*** claimed that Nevada was the correct jurisdiction. As a basic matter of estoppel, he cannot now be heard to complain that his own bad acts

deprived the Nevada courts of jurisdiction.[23] *See New Hampshire v. Maine*, 532 U.S. 742 (2001); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982).

In sum, the Nevada courts had jurisdiction to make the Hague determination, and Nevada was the proper venue, under the circumstances of this case and in the view of the Nevada, Texas, and Norway courts (the only courts involved in the case). The Hague Convention decision to return the children was made in the right place, and Scotlund has produced nothing in his Petition validly suggesting otherwise.

2. The Nevada Supreme Court Was Not Required To Review The Underlying Parenting Agreement By The Parties For Sufficiency Under Norway Law, And It Was Foreclosed From Doing So By The International Child Abduction Remedies Act And The Hague Convention On The Civil Aspects Of International Child Abduction.

As the Petition notes, the text of the Convention does not permit any court from reaching the merits of a custody dispute (under local ***or*** foreign law). Convention, Article 16. Scotlund correctly identifies the questions to be answered before a child is returned under the Convention,[24] but he then asserts that the Nevada courts failed to do an

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[23] Scotlund was given ample opportunity to raise the alleged lack of jurisdiction of the Nevada district court to hear Cisilie's Hague Petition in his pleadings in the lower court and during the evidentiary hearing, but he never raised any jurisdictional question until the Nevada Supreme Court ruled against him on the merits. Scotlund is precluded from arguing that the Nevada courts lacked such jurisdiction ***in the action he filed*** as was necessary to correct his wrongdoing.

[24] That the child was a habitual resident of the country from which the child was taken, that the parent making the Hague claim had and was exercising custodial rights to the child at the time of removal, and that the child was wrongfully removed from that parent's custody. Petition at 19; *see* Convention Articles 3, 4, & 5.

adequate inquiry into Norwegian law, and therefore erred in returning the children to Norway. He is wrong, for several reasons.

Scotlund does not appear to challenge that the children were habitual residents of Norway, where they had lived with Cisilie for about two years when Scotlund kidnaped them. Both the Nevada Supreme Court and the Norway appellate court have found ample evidence to support the children's status as habitual residents of Norway.[25]

A parent can have valid "rights of custody" in Hague terminology, by way of court order, ***or*** agreement of the parties, ***or*** local law. Convention, Article 3(b). In this case, the last valid custody order had been granted to Cisilie by the British court in 1998, which order had never been altered. A3; Writ Petition Ex. 1B. Additionally, the parties had expressly agreed that both children would remain in Cisilie's exclusive care until they were at least ten years old, and Scotlund kidnaped them when they were nine and five years old, respectively. A4. Finally, the Nevada Supreme Court had a copy of sections 38 and 64 of the Norwegian Children's Act explaining how Norway's laws gave way to Cisilie's rights of custody, and the Norwegian appellate court ruled that Cisilie was exercising rights of custody and had intended to make the children's stay in Norway permanent at the time they were kidnaped. *See* Bogarting Court of Appeal Order of February 9, 2001, *supra*, at 6-7.

It is therefore unremarkable that the Nevada Supreme Court casually stated that "Cisilie was properly exercising custody rights over the children when Scotlund

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[25] *See* A23-A25; Bogarting Court of Appeal Order of February 9, 2001 (in Motion for Permission to Submit Supplemental Exhibits [etc.], *supra*, filed February 15, 2001). Besides having the Norwegian Appellate Decision before it, the Nevada Supreme Court was also supplied with a Residence Certificate, issued in Norway on July 28, 1998, declaring Cisilie and both children to be residents of Norway.

arrived in Norway." A27. There was no evidence or argument of any kind before that court (or ***this*** Court) that could lead to any other conclusion. The Nevada Court had no reason to further explain its finding, which ***required*** a conclusion that Scotlund's kidnap was "wrongful."[26] Convention, Article 3.

Scotlund's suggested foray into the intricacies of how Norway would treat the parties' 1998 agreement executed in England is not only unnecessary, it is prohibited by the Convention and ICARA. If the Nevada courts ***had*** done what Scotlund urges in his Petition, and performed an inquiry as to how the Nevada or Norwegian courts should interpret the merits of the agreement, it would have run afoul of the specific proscription in ICARA:

> The Convention and this Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

42 U.S.C. § 11601(b)(4). Since the face of that agreement indicated that Cisilie had custody of the children at the moment Scotlund kidnaped them, the Nevada courts did what they should have done, and returned the children to Norway so that any dispute as to custody could be resolved in the country of the children's habitual residence.

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[26] The evidence presented at the evidentiary hearing provided the Nevada district court with enough factual evidence to determine the necessary factors for a Hague decision. Evidence was presented, both through testimony and the pleading exhibits, that (1) the children had been physically present in Norway for almost 2 years prior to their removal; (2) Scotlund had agreed to the children's moving to Norway and had allowed them to extend their stay; (3) Norway had acknowledged the children as residents; (4) Cisilie was the children's primary custodian, historically, by British court order, by agreement, ***and*** by Norwegian law – she was exercising custody; and (5) Scotlund's removal of the children from Norway interfered with Cisilie's exercising her rights of custody, making the removal wrongful. Despite having the necessary factors before it, the trial court declined to make the Hague determination, which deficiency the Nevada Supreme Court remedied.

3. The Petitioner Was Afforded His Procedural And Substantive Due Process Rights.

As a final argument, Scotlund asserts that he was denied due process in the legal proceedings leading up to the Opinion that the children should be returned to Norway. He is wrong.

Scotlund's argument has two points. First, he asserts that the Nevada Supreme Court was not "entitled" to make a Hague Convention order to return the children without remanding the matter first to the Nevada district court. Petition at 22-24. The parties conducted an extended evidentiary hearing which stretched to a second date, and both parties were given the opportunity to submit multiple written briefings before and after the hearing, as well as to call and cross-examine witnesses, and introduce such exhibits as they believed were relevant, ***at*** the hearing. *See* Tr. 10/11/2000.

As noted in the preceding section, there was no conflicting evidence as to the only questions of relevance to a Hague determination – the children's habitual residence, Cisilie's exercise of custodial rights, and the children's wrongful removal. The Nevada district court judge simply erred as the law to be applied to those facts, and the Nevada Supreme Court found ***as a matter of law*** that all prerequisites were established for an order "that the children be promptly returned to Norway so that the courts there can determine the issue of custody." A21.

This is precisely what is contemplated by the Convention, which is why Article 18 states that "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time," and Article 3 mandates that just as soon as a court determines that there has been a wrongful removal, "the authority concerned shall order the return of the child forthwith." No remand could have been appropriate here.

Second, Scotlund asserts that he did not have an opportunity to prove some (never-specified) point of Norwegian custody law. Petition at 24-25. As specified in the preceding section, the Norwegian appellate court already

issued a decision as to the only point of Norwegian law (the question of habitual residence) that was ***relevant*** to a Hague determination; any further inquiry into the merits of custody are foreclosed under the Convention and ICARA. Scotlund's claim that he was not given an opportunity to present irrelevant information is not a basis for review by this Court.

Cisilie's Motion for Immediate Return of Internationally Abducted Children was properly before the trial court during the evidentiary hearing, and both sides were given a full opportunity to submit whatever evidence they felt was relevant to that issue, before, during, and after that hearing. The Convention's explicitly stated purpose is to secure the ***prompt*** return of children to their country of habitual residence, and it would turn on its head both the Convention text and ICARA to interpret either of them as requiring any further proceedings than the briefing, evidentiary hearing, and appellate review that occurred here.[27] If there are points of substantive Norwegian law as to custody that Scotlund wishes to assert, he certainly has the opportunity to do so in the ongoing Norwegian custody case, where he has appeared and litigated, personally and through counsel, for years.

CONCLUSION

International child abduction is, indeed, a significant problem. The Convention and ICARA were instituted to provide a mechanism for ensuring the "prompt return to the State of their habitual residence" of such kidnaped children. In this case, the right court made the right decision for the right reasons, and the children have been returned to their state of habitual residence, where their

[27] The proceedings that Scotlund asks this Court to enlarge took almost exactly two years to return the kidnaped children to Norway.

custody can be determined in accordance with law. There is no valid reason for any further review of this case in this Court.

Respectfully submitted,

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